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In the Supreme Court
OF THE
United States

October Term, 1963

No. 1133

Twentieth Century-Fox Film Corporation, et al.,
Petitioners,

vs.

Samuel Goldwyn, et al., doing business as Goldwyn Productions, a limited partnership, successors in interest to the plaintiffs Samuel Goldwyn Productions, Inc.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are four corporations as to which respondent had judgment below in a private action under the antitrust laws. The defendants in the case fell into three groups:

(1) the "Fox" defendants (petitioners here);

(2) the "McNeil-Naify" defendants and

(3) the individual managers of these companies.

Thus far, only the case against the Fox defendants has been tried.

During the period in controversy (i.e. prior to the filing of the complaint in this case on May 16, 1950), petitioner Twentieth Century-Fox Film Corp. was one of the five major producers, distributors and exhibitors of motion pictures in the United States. National Theatres Corporation was a wholly-owned subsidiary of Twentieth Century-Fox Film Corporation and a holding company for its theatre interests. Petitioners Fox West Coast Theatres Corporation and Fox West Coast Agency Corporation were in turn, wholly-owned subsidiaries of National Theatres Corporation.

At the time the complaint in this case was filed, Twentieth Century-Fox Film Corporation and National Theatres Corporation (referred to collectively as "Fox") were named defendants in the case of *United States v. Paramount Pictures, Inc.*, No. 87-273 in the United States District Court for the Southern District of New York.[1]

Respondents are the successors in interest of Samuel Goldwyn Productions, Inc., a corporation which was plain-

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[1]Published opinions in the *Paramount* case include: *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323 (S.D.N.Y. 1946); *United States v. Paramount Pictures, Inc.*, 70 F.Supp. 53 (S.D.N.Y. 1947); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915 (1948); *United States v. Paramount Pictures, Inc.*, 85 F.Supp. 881 (S.D.N.Y. 1949); *Twentieth Century Fox Film Corp. v. United States*, 339 U.S. 974, 70 S.Ct. 1032; *Twentieth Century Fox Film Corp. v. United States*, 340 U.S. 857, 71 S.Ct. 70.

tiff below. Plaintiff below was never a party to the *Paramount* case in any way, shape or form and, indeed, did not come into existence until October 1945. It was neither an exhibitor nor distributor of films. It produced films, and by force of economic necessity, distributed them through RKO Radio Pictures, Inc. a defendant in the *Paramount* case. Its predecessors in interest as to some of the films involved in its complaint (although not involved in the trial below, because of the trial Court's decision on the Statute of Limitations) were similarly neither exhibitors nor distributors but solely producers of film, some of which were distributed through United Artists Corporation, a *Paramount* case defendant, and some through RKO, a *Paramount* case defendant.

Samuel Goldwyn, the principal stockholder in Samuel Goldwyn Productions, Inc., plaintiff below, was named as a defendant in the original petition in the *Paramount* case, filed July 20, 1938. He was charged with being a Director of United Artists Corporation along with Mary Pickford, Douglas Fairbanks, Charles Chaplin and others. Samuel Goldwyn, Inc. Ltd., the company through which Samuel Goldwyn produced motion pictures at the time of the original petition in the *Paramount* case, was not named, nor, of course, was plaintiff below, Samuel Goldwyn Productions, Inc.

Samuel Goldwyn was dismissed as a defendant in the *Paramount* case on April 6, 1939. (See affidavit of petitioners' counsel filed in support of motion for partial summary judgment, p. 25c of Appendix C to Petition). The amended complaint in the *Paramount* case was filed November 14, 1940. It did not name Samuel Goldwyn (or Samuel Goldwyn Inc. Ltd.) in any capacity.

When the original Paramount complaint was filed, Mr. Goldwyn was a minority stockholder and a director of United Artists Corp. In 1941, Mr. Goldwyn terminated all interest in United Artists Corp. Samuel Goldwyn Productions, Inc. the plaintiff below, had no interest in United Artists Corp. at any time. Neither Mr. Goldwyn nor Samuel Goldwyn Productions, Inc. ever had any financial interest in or voice in the management of RKO Radio Pictures, Inc. (App. C, p. 513c).

When the original Paramount complaint was filed, Mr. Goldwyn took the position that United Artists Corp. should co-operate with the United States—a position adverse to that actually taken by United Artists Corp. (Id.)

Plaintiff's president, James A. Mulvey, actively assisted the United States in the prosecution of the *Paramount* case by furnishing Tom C. Clark, Assistant Attorney General in charge of the Antitrust Division with information on anti-competitive practices in motion picture exhibition (and particularly "splits of product") all over the United States. (App. C, pp. 514c-521c).

When the defendants in the *Paramount* case appealed to this Court in 1947, the Society of Independent Motion Picture Producers, of which Mr. Goldwyn was one of the leading founders and one of its most active members, hired counsel and appeared as *amicus curiae* in support of the position of the United States. (App. C, pp. 537c-539c).

On May 16, 1950, Samuel Goldwyn Productions, Inc. filed its complaint in this case, charging that the Fox defendants, the Naify circuit (in which Fox had a sub-

stantial financial interest) and others acting in concert with them, had violated the antitrust laws by contracting, combining and conspiring to monopolize and to restrain trade in the exhibition of motion pictures. The complaint alleged that these antitrust violations had resulted in plaintiff's receiving lower film rentals than it would have obtained under competitive conditions.

The Fox defendants answered, raising as defenses both the one year statute of limtations of California (Calif. Code Civ. Proc. 340) and the three year statute of limitations (Calif. Code Civ. Proc. 338).

The case was subsequently severed and Samuel Goldwyn Productions, Inc. prepared to go to trial against petitioners, which thereupon made the motion for partial summary judgment upon which the present petition is principally based. Petitioners urged the trial court to hold that all claims more than three years old were barred by the California three year statute of limitations. They did not in any way urge the trial court to apply the shorter California statute of limitations.

Plaintiff below did not dispute the correctness of the proposition that California's three year statute of limitations was the correct statute to apply, but urged that that statute had been tolled under Section 5 of the Clayton Act by the pendency of the *Paramount* case. Plaintiff below contended that its right of action was based in part on matters complained of in the *Paramount* case. It also contended that the findings, conclusions and decrees in the *Paramount* case were *prima facie* evidence that Twentieth Century-Fox and National Theatres Corp. had violated the antitrust laws.

Judge Murphy, in an opinion reported as *Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (1956), granted petitioners' motion for partial summary judgment. As petitioners had requested, he ruled that California's three years statute of limitations was applicable to the case. He rejected the argument of plaintiff below that the statute of limitations had been tolled by the pendency of the *Paramount* case. He also held inadmissible as against Twentieth Century-Fox and National Theatres the judgments, findings of fact and decrees in the *Paramount* case.

The case thereafter went to trial before Judge Murphy, but before he could render judgment, Judge Murphy died. The case was then reassigned to Judge Harris, whose opinion holding petitioners liable for damages, costs and attorneys fees is reported as *Samuel Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp.*, 194 F.Supp. 507 (1961).

All parties thereupon appealed. In a lengthy, painstaking opinion, the Ninth Circuit reviewed all aspects of the case, affirming in part and reversing in part. It is to that opinion, reported as *Twentieth Century Fox Film Corp. v. Samuel Goldwyn, et al.*, 328 F. 2d 190 (1964) that petitioners have directed their petition for a writ of certiorari.

REASONS FOR REFUSING THE WRIT

SUMMARY OF ARGUMENT

In their petition for the writ of certiorari, petitioners have set forth four questions which they ask the Court to consider on this record. Three of these questions (1,

2 and 4) are not presented by this record at all. Questions 1 and 2 assume that Samuel Goldwyn Productions, Inc., plaintiff below, was "charged with being a participant in and beneficiary of" the *Paramount* conspiracies. Question 4 assumes that Samuel Goldwyn Productions, Inc., plaintiff below, was not only so "charged" but was actually a "participant in and beneficiary of" the *Paramount* conspiracies. Neither assumption is supported by anything in the record. Both assumptions are contrary to fact. And in any event, even if the plaintiff in this case had been "charged with being", or had actually been, a participant in and beneficiary of the *Paramount* conspiracies, such circumstance would be irrelevant to this antitrust action. The doctrine of "unclean hands" or "in pari delicto" is not a defense in antitrust cases. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

Petitioner's Question 3 asks whether the Ninth Circuit correctly held that petitioners cannot assign as error a ruling of the trial court which they themselves obtained over the objection of plaintiff below. Petitioners pleaded in their answer two affirmative defenses of statutes of limitation. They pleaded the California one year statute of limitations and also the California three year statute of limitations. Thereafter, without mentioning the one-year statute, petitioners made a motion for partial summary judgment *based upon the three year statute of limitations*. Their motion was granted and the case was then tried on the basis of a three-year damage period.

On appeal to the Ninth Circuit, however, petitioners assigned as error the trial court's application of the three

year statute of limitations, rather than the one year statute. The Ninth Circuit held that "defendants (petitioners) are not now in court on that issue." 328 F.2d 215. This decision is so clearly correct as to make petitioner's request for review frivolous.

It need only be added that the promised "conflict between the circuits" does not materialize as to any of the four questions posed by petitioners.

This case has been the subject of scrupulously careful review after a lengthy trial to a court which resulted in an enormous record and extensive findings of fact. There are no grounds warranting further review of any matter in the case by this Court. The petition for the writ of certiorari should be denied.

ARGUMENT

1. Petitioners state their Question 1 as follows:

"May one who is charged with being a participant in and beneficiary of a conspiracy in an antecedent Government action rely upon such Government action, under Section 5 of the Clayton Act, to suspend the statute of limitations in a private right of action?"

This question is not presented by this record. Samuel Goldwyn Productions, Inc., the corporate plaintiff in this suit, was never at any time charged with anything in the case of *United States v. Paramount Pictures, Inc.*, No. 87-273 (D.C.S.D.N.Y.), the government action which suspended the statute of limitations in this case.

Furthermore, Samuel Goldwyn, the natural person, was never charged with being a "participant in and beneficiary

of" any of the antitrust violations which the Government proved in the *Paramount* case. Samuel Goldwyn was originally a named defendant, in his capacity as a director of United Artists Corp., but was almost immediately dismissed. Mr. Goldwyn was not named in the subsequent amended *Paramount* complaint under which the case was finally tried.

Even if petitioners' Question 1 were presented by this record, there would be no grounds for review in this Court.

Petitioners' theory that Samuel Goldwyn Productions, Inc. is disentitled to the benefits of Section 5 of the Clayton Act rests upon the following syllogism:

(a) Samuel Goldwyn, the natural person, was a participant in and beneficiary of the *Paramount* violations because he was once named as a defendant, although almost immediately dismissed.

(b) Samuel Goldwyn Productions, Inc., the plaintiff below, was also a participant in and beneficiary of the *Paramount* violations because Mr. Goldwyn, its principal owner, was once named in the *Paramount* case, as a director of United Artists Corporation.

(c) Since plaintiff below was tainted by the *Paramount* violations (via a double-barreled process of "guilt by accusation" and "guilt by association") it is disentitled to the benefits of Section 5 of the Clayton Act.

Steps (a) and (b) are not only without legal support but positively offensive to reason, elementary justice and the "due process" clause of the Constitution.

Step (c) is an application of the doctrine of "in pari delicto" or "unclean hands"—as a defense to the tolling provisions of Section 5 of the Clayton Act. There is no warrant for such a doctrine in the cases; on the contrary, these defenses are not available, even on the merits as to liability, in antitrust cases. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214, (1951); *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1951); *Moore v. Mead Service Co.*, 340 U.S. 944 (1951) reversing 184 F.2d 338 (10th Cir. 1954).

Nowhere in this record is there any support for the proposition that Samuel Goldwyn Productions, Inc., or Samuel Goldwyn himself was a "participant in" or "beneficiary of" the *Paramount* exhibition violations. On the contrary, the record shows that Samuel Goldwyn aided and assisted the Government in the prosecution of the *Paramount* case. The *Paramount* monopolization and conspiracies had produced a network of monopoly in motion picture exhibition which Mr. Goldwyn (as his SIMPP Brief shows) claimed seriously injured the exhibition revenues of the films produced by Samuel Goldwyn.

Nowhere, it should be added, do petitioners cite any case holding that the benefits of Section 5 of the Clayton Act are unavailable to one "*charged* with being a participant . . ." in a government action, much less a case showing any conflict between the circuits. There is none. The authority is to the contrary. *William H. Rankin Co. v. Associated Bill Poster*, 42 F.2d 152, 153 (2nd Cir. 1930) cert. denied, 282 U.S. 864.

Considered in the light of the facts in this case, petitioners' Question 1 is patently frivolous.

Indeed, petitioners' argument on this question is actually directed to an entirely different point. It undertakes to show that the private right of action of Samuel Goldwyn Productions, Inc. is not "based in whole or in part on any matter complained of in" the *Paramount* case. Petitioners rely principally upon two other Ninth Circuit cases: *Steiner v. Twentieth Century Fox Film Corporation,* 232 F.2d 190 (9th Cir. 1956) and *Leh v. General Petroleum Corp.,* ..... F.2d ..... (9th Cir. No. 18,333, 1964, CCH Trade Cases, Para. 71,079).

Petitioners urge that the Ninth Circuit has not followed the test of *Steiner:* "The same means must be used to achieve the same objectives of the same conspiracies by the same defendants". (232 F.2d at 196). Respondents contend that the Ninth Circuit in this case properly followed the statute which provides: ". . . the running of the statute of limitations in respect of *every* private right of action . . . based in whole *or in part* on *any matter* complained of. . . ." in a government action is suspended during the pendency of the government case. (Clayton Act, Section 5; emphasis added.)

Whatever the merits of *Steiner* (see *Twentieth Century Fox v. Goldwyn,* 328 F.2d 190, 219-220, n. 58 (9th Cir. 1964)), the fact remains that the Ninth Circuit expressly found that respondents *had* met the overly stringent *Steiner* test (328 F.2d at 219). There is no intra-circuit conflict between the *Goldwyn* and *Steiner.*

As for the *Leh* case, decided since the case at bar, petitioners' argument is best directed to a petition for certiorari to review *Leh.* In *Goldwyn,* the Ninth Circuit held that the plaintiff had met the onerously strict test of *Steiner.* In *Leh,* the Ninth Circuit held that the plaintiff

had failed to met the *Steiner* test. Respondents urged below in *Goldwyn* that the *Steiner* test is in flat contravention of the statute which it purports to interpret, and that it was wrongly decided. But since the Ninth Circuit held that the strict *Steiner* test had been met in *Goldwyn*, it cannot be properly reviewed on this record.

In *Leh*, by contrast, the Ninth Circuit found that the plaintiff had *not* met the *Steiner* test, and held that all of the plaintiff's claims were barred by the statute of limitations.

Even if it be assumed that the Ninth Circuit misapplied *Steiner* in deciding *Goldwyn*, it did no more than to bring itself into conformity with the great weight of authority which affords Section 5 of the Clayton Act a reading more in keeping with the plain meaning of the statutory language. See e.g. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 568-571 (10th Cir. 1962); *Grengs v. Twentieth Century Fox Film Corp.*, 232 F.2d 325 (7th Cir. 1956), cert. denied 352 U.S. 871, 77 S.Ct. 96 (1956); *Philco Corp. v. Radio Corp. of America*, 186 F.Supp. 704 (N.D. Ill. 1956); *United Banana Co. v. United Fruit Co.*, 172 F.Supp. 580 (D. Conn. 1959); Cf. *Christensen v. Paramount Pictures, Inc.*, 95 F.Supp. 446, 454 (D. Utah 1950).

Petitioners' Question 1 should not be reviewed for two reasons: (1) the question, as stated, is not presented by this record and (2) The question actually presented was correctly decided.

2. Petitioners state their Question 2 as follows:

"May one who is charged with being a participant in and beneficiary of a conspiracy in an antecedent gov-

ernment action claim as a plaintiff the benefits of section 5 of the Clayton Act when he offers a final decree in a government action as prima facie evidence against his co-conspirators as establishing the conspiracy alleged in his own action?"

This question, rests upon the same false assumption as Question 1: that since Samuel Goldwyn was once named a defendant in the *Paramount* case (in his capacity as director of a distribution corporation) the corporate plaintiff below, in which Mr. Goldwyn was the principal stockholder, must be conclusively deemed to have been a participant in and beneficiary of antitrust violations complained of by the government in the *Paramount* case. The whole proposition is basically unjust and involves guilt by association as we have shown above.

Respondents have never asserted, as petitioners would seem to imply, that the matters decided in the *Paramount* case would completely prove all of the elements of their case against petitioners. Indeed, respondents proved their case for the three-year period from 1947 to 1950 by the weight of overwhelming evidence independent of the *prima facie* evidentiary effect which should have been given to matters "distinctly put in issue and directly determined" as between the United States and the Fox defendants in the *Paramount* case. (See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).)

The *Paramount* case proved that Twentieth Century Fox and National Theatres had violated the antitrust laws. To be sure it did not prove the amount of respondents' damages. Respondents have never contended that the

Paramount case is dispositive of all elements of their case, and the Ninth Circuit did not so hold.

What the Ninth Circuit *did* hold is that respondents may use the facts established against the Fox defendants in *Paramount* as prima facie proof of any matter relevant to their case. This decision is so clearly correct, it is difficult to imagine how it could possibly justify review.

The only semblance of an argument that petitioners can muster is that there is a case in the Second Circuit in which an independent producer of motion pictures lost: *Eagle Lion Studios v. Loew's Inc.*, 248 F.2d 438 (2d Cir. 1957). *Eagle Lion* was a close case; but for the untimely death of Judge Frank, it would have gone the other way. (See dissent of Judge Clark, 248 F.2d at 451.) This Court was equally divided (358 U.S. 100).

The *Eagle Lion* case is entirely distinguishable. The fundamental issues of fact were decided adversely to the plaintiff in that case; it did not really go off on questions of law. There, the plaintiff tried to plug the holes in its proof with the *Paramount* case, and failed. But *Eagle Lion* does not stand for the proposition that the *Paramount* decisions are irrelevant to a producer's private right of action. To the contrary, matters determined against the *Paramount* defendants were admitted in evidence in the *Eagle Lion* case. On the facts of the case, however, the Court decided that the *Paramount* decisions were just not adequate to patch the holes in plaintiff's proof.

Petitioner's Question 2 should not be reviewed for two reasons: (1) The Question, as stated, is not presented by

this record and (2) The question actually presented was clearly decided correctly.

3. Petitioners state their Question 3 as follows:

"Did petitioners waive the California one-year statute of limitations, although pleading it as a partial defense, because the district court had previously granted petitioners' motion for summary judgment based on the California three-year statute?"

Petitioners pleaded both one-year and three-year statutes of limitations. Their motion for partial summary judgment, however, asked the District Court to apply the three-year statute of limitations, and the motion was granted. Not until their appeal from an adverse judgment on plaintiff's three-year case did petitioners attempt to assign as error the very ruling which they had requested. The Ninth Circuit disposed of that point on the obvious and unassailable ground that ". . . having invited the asserted error which they contend results from application of the three-year statute, defendants are not now in court on that issue" (328 F.2d at 215).

Cases cited by petitioners are not in point. Whatever the merits of cases permitting defendants to amend their answers to plead tardy defenses prior to trial (or re-trial, as the case may be), a possible defense known to exist at the time of answering, pleaded in the answer, and intentionally abandoned prior to trial, cannot be revived and asserted for the first time on appeal from an adverse judgment.

The decision of the Ninth Circuit on this point is absolutely correct. Petitioners cite no authority whatever

fairly supporting a contrary view. There are no grounds for review of Question 3.

4. Petitioners state their Question 4 as follows:

> *"May a participant in and beneficiary of a conspiracy in an antecedent government action recover against his alleged co-conspirators?"*

In this Question, petitioners revert to the "guilt-by-accusation-plus-guilt-by-association" syllogism to prove that plaintiff below (Samuel Goldwyn Productions, Inc.) was a "participant in and beneficiary of" the *Paramount* conspiracies. As we have shown above, plaintiff below was never charged with anything whatsoever in the *Paramount* case. That should end the inquiry.

But petitioners insist that since Samuel Goldwyn, principal stockholder of plaintiff below did business with United Artists and RKO (both *Paramount* defendants), plaintiff cannot recover against Twentieth Century Fox or National Theatres Corp.

This incredible argument proceeds on the assumption that "unclean hands" or "in pari delicto" may be proven conclusively against respondents by reference to the *Paramount* case, although plaintiff below was not named as a defendant in that case, and Samuel Goldwyn, its principal stockholder, was dismissed from the case more than 10 years prior to its ultimate determination. In other words, petitioners urge that the *Paramount* decisions are *conclusive* evidence against persons *not defendants* in that case. Needless to say, petitioners have been unable to find any authority for such an extraordinary proposition.

Petitioners never offered any independent evidence that either Mr. Goldwyn or Samuel Goldwyn Productions, Inc. actually participated in or benefited from any conspiracy whatsoever. And in actuality, the facts show that Mr. Goldwyn was allied not with the *Paramount* defendants but with the Government (Appendix C, pp. 513c-521c and pp. 537c-542c). In actuality the record shows that Goldwyn fought the restrictive practices of the major circuits (R. 3980-3981, 4351-4356; Pl. Ex. 369, R. 4335-4351; 5041-5042).

Furthermore, assuming the facts were as represented by petitioners, their position would be legally untenable. Assuming that petitioners had shown as against plaintiff below that RKO was in fact violating the antitrust laws in various ways, there were allegations in the United States complaint that each producer-distributor, petitioners here, coerced defendant distributors and other distributors of films to allow it terms preventing competition from unaffiliated theatres (Appendix C, p. 235c).

There is, in short, no basis for petitioners' threshold assumption that Samuel Goldwyn or his production companies ever participated in or benefited from the *Paramount* conspiracies.

But assuming *arguendo* that plaintiff or its predecessors in interest had been implicated in a conspiracy through United Artists and RKO, there would still be no defense under defendants' arguments. This Court has repeatedly held that "pari delicto" or "unclean hands" is no defense. See *Kiefer Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1950) and *Moore v. Mead's Serv-*

ice Company, 340 U.S. 944 (1951). These cases, of course, are not discussed by petitioners, and they supersede the old circuit court opinions cited by petitioners.

Question 4 is not presented by the record in this case. Neither is any question resembling it; there is absolutely no proper basis in this record for the proposition that plaintiff below ever participated in or benefited from any of the conspiracies charged in the *Paramount* case. On the contrary, the evidence showed that Samuel Goldwyn Production, Inc., plaintiff below and Samuel Goldwyn had fought the *Paramount* exhibition monopolies, and had been seriously injured by them. The trial court made elaborate findings of fact showing that plaintiff below was a victim, not a beneficiary of the Fox defendants' activities in furtherance of the *Paramount* conspiracies. After a painstaking review of those findings, the Ninth Circuit affirmed. Without attempting to challenge any of those findings as erroneous, petitioners now seek review on the basis of groundless assertions that plaintiff below participated in and benefited from the *Paramount* conspiracies. Petitioners' argument has no basis in law or in fact. The petition should be denied.

CONCLUSION

For the reasons stated above, none of the questions posed by petitioners merit consideration by this Court, and respondents respectfully urge that the petition be denied in its entirety.

Respectfully submitted,

JOSEPH L. ALIOTO.
GEORGE SLAFF,
MAXWELL KEITH,
Attorneys for Respondents.

MATTHEW P. MITCHELL,
Of Counsel.